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## Procedural Rights in the Context of Restrictive Measures : Does the Adversarial Principle Survive the Necessities of Secrecy?

Leppävirta, Liisa Helena

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## ARTICLES

### SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

#### PROCEDURAL RIGHTS IN THE CONTEXT OF RESTRICTIVE MEASURES: DOES THE ADVERSARIAL PRINCIPLE SURVIVE THE NECESSITIES OF SECRECY?

LIISA LEPPÄVIRTA\*

TABLE OF CONTENTS: I. Introduction. – II. The legal framework concerning restrictive measures. – III. The development of the right of access to the file. – IV. Access to “secret evidence” by the CJEU. – V. Conclusions.

**ABSTRACT:** Safeguarding fundamental procedural rights in the context of security concerns has been topical in the EU ever since the increased threats of terrorism post-9/11. This *Article* revisits the landmark case law on *Kadi*, which provided the premise for balancing due process rights and security concerns in the context of restrictive measures. The focus of this *Article* is on the specific procedural right of access to the file. The *Article* begins with a description of the legal framework on restrictive measures to the extent it is necessary for understanding the production and flow of information in the sanctions context. It then proceeds to scrutinise the development of the right of access to the file in this context through the *Kadi* cases and subsequent case law. The *Article* moves on to deal with the new developments in the Rules of Procedure of the General Court, which introduced a new closed procedure in cases concerning security related information or evidence, something that has clear implications for the targeted person’s right of access to the file. The amendments to the Rules of Procedure challenge the traditional role of the Court and, so it is argued, pose some challenges to its legitimacy.

**KEYWORDS:** restrictive measures – procedural rights – access to the file – adversarial principle – closed material procedure – special advocates.

\* Doctoral candidate, University of Helsinki, liisa.leppavirta@helsinki.fi.

## I. INTRODUCTION

"Public administrators are often inclined to hold that extraordinary circumstances (such as war or terrorist attacks) call for extraordinary measures, regardless of the resulting threats to general legal principles, especially procedural safeguards".<sup>1</sup>

This is how, in 2009, Giacinto della Cananea starts his analysis of the famous *Kadi* case (*Kadi I*). At the time this also reflected the reality in the UN context. Mr Kadi was faced with a situation where all his assets were frozen for years without him knowing why, what evidence existed against him or even what his procedural rights were. Then suddenly one day Mr Kadi learned that he had been taken off the list. The *Kadi* case law provides an illustration of the balancing between security interests and procedural rights in the context of the EU. The CJEU found in favour of at least some guarantee of due process and procedural safeguards, even in the context of security threats posed by terrorism.

The procedural rights referred to by della Cananea are explicitly codified in the Charter of Fundamental Rights of the European Union (CFR). The right to an effective remedy and to a fair trial are fundamental rights guaranteed by Art. 47 of the CFR, which essentially provides for the right to an effective remedy before a tribunal against violations of rights and freedoms guaranteed by EU law. It also entails the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Moreover, Art. 41 of the CFR provides for the right to good administration, which essentially includes the right to be heard, the right to have access to his or her file and the obligation of the administration to give reasons for its decisions. What is of interest in security-related matters is the way that the jurisdiction of the Court of Justice has been limited in the context of the Union's Common Foreign and Security Policy (CFSP), reflecting the special nature of the policy area in the EU. However, the Court has jurisdiction with regard to decisions providing for restrictive measures against natural or legal persons, which indicates an understanding that legal remedies are of a particular importance in this context, since sanctions address natural and legal persons, groups or non-State entities.

Della Cananea ends his article with a forward-looking conclusion about how it remains to be seen whether, post-9/11, the CJEU will eventually be capable of mediating these kinds of conflicts between collective interests and individual rights. Situations concerning public security are the ultimate crash test of the real effectiveness of procedural safeguards, where the realisation of the right of access to information might particularly threaten public security. The aim of this *Article* is to pick up where della Cananea's forward-looking conclusion left off and examine how the CJEU has mediated the conflict between the collective interests and individual rights in the con-

<sup>1</sup> G. DELLA CANANEA, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, in *Columbia Journal of European Law*, 2008-2009, p. 512.

text of security. The focus of this *Article* is on the procedural right of access to the file enshrined in the CFR. After a brief summary of the background and main legal challenges highlighted in the *Kadi* saga, and the status of file access in EU law, this *Article* will move on to discuss the new Rules of Procedure of the General Court. The new rules introduced the possibility of a so-called “closed procedure”, which provides for an exception to the adversarial principle: the General Court is essentially allowed to base its decision on material not disclosed to the party in question, when the information is sensitive from the perspective of security. In doing so, the CJEU effectively takes the role usually occupied by the individual in examining and verifying evidence, based on the adversarial principle. This *Article* argues that, when providing an accountability avenue for the EU executive, the CJEU might in fact undermine its own legitimacy, and thus create another accountability gap.

## II. THE LEGAL FRAMEWORK CONCERNING RESTRICTIVE MEASURES

Sanctions are one of the foreign policy tools utilised by the EU to promote the objectives of the CFSP, i.e. peace, democracy and respect of the rule of law, human rights and international law. Although commonly referred to as “sanctions”, they are in fact formally called “restrictive measures” in the EU Treaties.<sup>2</sup> European sanctions policy started to evolve in the early 1980s when the EU members began to impose sanctions collectively and autonomously.<sup>3</sup> Initially based on trade powers, these measures now have their own legal basis in Art. 215 TFEU and extend beyond trade restrictions to include e.g. capital movements, asset freezing and visa bans. The practice gradually increased in frequency and sophistication to the point that it is now possible to speak of an EU sanctions policy.<sup>4</sup> There are three types of sanctions in the EU: those implementing sanctions imposed by the UN, those reinforcing UN sanctions through stricter or additional measures and those that the EU adopts autonomously, often in relation to situations where the UN Security Council has not been able to agree on sanctions.<sup>5</sup> Sanctions may also be differentiated according to target. They may target a third country and its political regime, and these sanctions may also include individualised measures aimed at leading figures in the targeted government or regime. The EU also implements counter-

<sup>2</sup> Arts 215 and 275 TFEU.

<sup>3</sup> C. PORTELA, *Where and Why Does the EU Impose Sanctions?*, in *Politique Européenne*, 2005, p. 84. See also P. KOUTRAKOS, *Trade, Foreign Policy and Defence in EU Constitutional Law*, Oxford: Hart Publishing, 2001, p. 7 *et seq.*

<sup>4</sup> On the evolution of the sanctions policy and legal framework see C. PORTELA, *European Union Sanctions and Foreign Policy*, Abingdon: Routledge, 2010, p. 19 *et seq.*

<sup>5</sup> C. ECKES, *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions*, in *Common Market Law Review*, 2014, p. 873 *et seq.*

terrorist sanctions regimes, which are not geographically defined and which are based on individual listings received from the UN Security Council.<sup>6</sup>

The focus of this *Article* is on the counterterrorist sanctions imposing restrictive measures on individuals and legal persons, commonly known as terrorist listings, but reference is made to case law on third country sanctions as well.<sup>7</sup> All sanctions, in particular those adopted outside the framework of the UN Security Council, raise questions of compatibility with international law, an aspect of their legality which will not be developed here.<sup>8</sup>

In general, the procedure for adopting restrictive measures in the EU operates in two stages. First, a decision is adopted under Art. 29 TEU in accordance with Chapter 2 of Title V of the TEU, which concerns the CFSP of the Union. All restrictive measures are included in the Council CFSP decision, however in order to give full legal effect to the decision, additional measures are sometimes needed. Arms embargoes and restrictions on admission are implemented directly by the Member States based on the CFSP decision, which is legally binding on the Member States.<sup>9</sup> Economic measures, such as asset freezes and export bans, which fall within the competence of the Union, require the adoption of a regulation to implement the Council CFSP decision and ensure its uniform application throughout the Union. The regulation is adopted by qualified majority and the European Parliament is informed.<sup>10</sup> In the case of Council regulations implementing UN-based sanctions, the Commission has been empowered to make changes through Commission implementing regulations to the annex containing the list of persons, groups and entities on the basis of determinations made by the UN Security Council or its Sanctions Committee, followed up by a Council decision under CFSP.<sup>11</sup>

<sup>6</sup> *Ibid.*, p. 869.

<sup>7</sup> From the perspective of the right of access to the file, counterterrorist measures are more often based on classified or confidential information gathered e.g. through intelligence, that is sensitive particularly from the perspective of security. On the reluctance of sharing intelligence information with international organisations see S. CHESTERMAN, *The Spy Who Came in from the Cold War: Intelligence and International Law*, in *Michigan Journal of International Law*, 2006, p. 1118. In the context of third country measures, concerns about the confidential nature of the listing information are not as pertinent. For third country sanctions see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law": *Challenging Common Foreign and Security Policy Measures Before the Court of Justice*, in *European Papers*, 2017, Vol. 2, No. 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 671 *et seq.*

<sup>8</sup> See further C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylant-Larcier, 2013.

<sup>9</sup> Council, Guidelines 11205/12 of 15 June 2012 on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, para. 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> See e.g. Regulation (EC) 881/2002 of the Council of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

The legal basis for adopting the regulation implementing the measures contained in the CFSP decision is Art. 215 TFEU, which is the legal basis for adopting all regulations containing sanctions, regardless of their autonomous or non-autonomous origin or type of sanction. The aim of the sanction is not relevant for the choice of legal basis. Both third country sanctions and those targeting terrorist regimes are adopted on the basis of this Article, which provides for the adoption of the necessary measures as well as stipulates an obligation to provide necessary legal safeguards in the regulation:

- “1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. The acts referred to in this Article shall include necessary provisions on legal safeguards”.<sup>12</sup>

Art. 275, para. 2, TFEU provides an exception to the general lack of competence of the Court of Justice in the area of the CFSP. Pursuant to this Article, the Court of Justice has jurisdiction with respect to decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU.

The adoption practice of Council regulations seems to vary with regard to the explicit references made to paras 1 and 2 of Art. 215 TFEU.<sup>13</sup> The difference between the

<sup>12</sup> Art. 215 TFEU. Art. 75 TFEU also contains wording that could provide a legal basis for adopting restrictive measure with a counter-terrorist aim, but the Court of Justice has found Art. 215, para. 2, TFEU to be the appropriate legal basis for measures “directed to addressees implicated in the acts of terrorism, who, having regard to their activities globally and to the international dimension of the threat they pose, affect fundamentally the Union’s external activity”. See Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council of the European Union* [GC], para. 78. See also C. ECKES, *EU Restrictive Measures*, cit., p. 880.

<sup>13</sup> Christina Eckes has found a distinction in the practice of Council regulations, where third country sanctions are usually adopted on the basis of Art. 215 TFEU without distinguishing between paras 1 or 2, whereas terrorist sanctions against Al Qaeda were adopted specifically on the basis of Art. 215, para. 2. However, a recent Council Regulation imposing additional restrictive measures directed against ISIL (Da’esh) and Al Qaeda refers only to Art. 215 TFEU without distinction. Moreover, the General Court refers specifically to Art. 215, para. 2, TFEU also in the context of third country sanctions regardless of the fact that the legal instrument only refers to Art. 215 without making the distinction. Therefore, it would seem that the explicit reference to the paragraph of the legal basis in the legal instrument is irrelevant, at least from the perspective of judicial review. See Regulation (EU) 2016/1686 of the Council of 20 September 2016 imposing additional restrictive measures directed against ISIL and Al-Qaeda and natural and legal

two paragraphs has been described to be the individual and objective character of the sanctions regime. Para. 1 entails the objective measures in relation to third countries, such as embargoes, whereas para. 2 entails all targeted individual measures against natural or legal persons and groups or non-State entities.<sup>14</sup> For the purpose of application of Art. 275, para. 2, TFEU, it is irrelevant whether the sanctions are connected to terrorist activities or third country measures.<sup>15</sup> Thus, the Court of Justice has jurisdiction on both occasions, when natural and legal persons are targeted by sanctions.

The right to judicial review in the CJEU is now clearly established in the context of targeted restrictive measures, also at Treaty level. In practice, the right has been actively used by individuals and entities.<sup>16</sup> However, the extent of judicial review has been the subject of debate.<sup>17</sup> In the *Kadi* saga, the question of the right to judicial review in the CJEU of a targeted measure originating in a UN Security Council decision to list the person was extensively researched and given a fairly clear conclusion.<sup>18</sup> One of the key issues concerning the extent of judicial review settled in *Kadi* was the question of the CJEU's competence to review a decision of the EU implementing a UN decision listing a person as a terrorist. According to the Court of Justice, a targeted individual has the right of judicial review in the CJEU also in these cases, and the extent of the review is "in principle full review".<sup>19</sup> This is regardless of the fact that the EU institution might have very limited information on the background and the material evidence behind the listing decision.<sup>20</sup>

The availability of the information is a key concern, particularly in the context of EU sanctions implementing UN sanctions, where the information seems to be inaccessible for the EU or its Member States.<sup>21</sup> However, problems have also occurred in the context

persons, entities or bodies associated with them; and e.g. General Court, judgment of 15 September 2016, case T-348/14, *Yanukovych v. Council of the European Union*, para. 3; and compare with C. ECKES, *EU Restrictive Measures*, cit., p. 880 *et seq.*

<sup>14</sup> C. ECKES, *EU Restrictive Measures*, cit., p. 882.

<sup>15</sup> *Ibid.*

<sup>16</sup> A search in the Court's database based on their classification scheme lists 192 cases as at 1 June 2017 under the classification of restrictive measures – freezing of funds and various prohibitions.

<sup>17</sup> For a more in-depth analysis of the extent of judicial review, see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law", cit., p. 671 *et seq.*

<sup>18</sup> Court of Justice: judgment of 3 September 2008, joined cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)* [GC]; judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC]. For a review of the case law see e.g. P. LEINO, "In Principle the Full Review": What Justice for Mr Kadi?, in R. LIIVOJA, J. PETMAN (eds), *International Law-making – Essays in Honour of Jan Klabbers*, Abingdon: Routledge, 2014.

<sup>19</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 97.

<sup>20</sup> *Ibid.*

<sup>21</sup> S. CHESTERMAN, *The Spy Who Came in from the Cold War*, cit.

of autonomous EU sanctions.<sup>22</sup> The lack of access to information in the EU concerns not only the person targeted by the restrictive measures, but also the CJEU, which has been unable to gain access to relevant information.<sup>23</sup> Regardless of the ideal of the standard of review, the practical impediments regarding access to information are bound to set some limits upon the extent of review.

In the context of the UN, the criteria for listing are set out in a Security Council resolution. Following a proposal by a UN member, the Sanctions Committee, consisting of members of the Security Council, applies these criteria in its decisions on designation of organisations, entities and individuals whose funds and other economic resources are to be frozen. The Security Council advises that the listing requests:

“[M]ust contain a detailed statement of case in support of the proposed listing and the specific criteria under which the names of individuals, groups, undertakings and/or entities are being proposed for designation, including: 1) specific findings and reasoning demonstrating that the listing criteria are met; 2) details of any connection with a currently listed individual or entity; 3) information about any other relevant acts or activities of the individual/entity; 4) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.); 5) supporting evidence or documents”.<sup>24</sup>

Moreover, the UN Member State is advised to provide information to support the identification process. The Committee considers the listing request and makes a decision. If a name is added to the sanctions list, the Committee makes a narrative summary of reasons for listing available on its website, which is based on the information provided by the requesting Member State.<sup>25</sup> The Council of the EU takes the decision implementing the UN Sanctions Committee listing based on this summary of reasons. The Sanctions Committee does not have an obligation to make available to the competent EU authority any material other than the summary of reasons.<sup>26</sup>

However, in *Kadi II* the Court of Justice held that the effectiveness of judicial review guaranteed by Art. 47 of the CFR requires that the CJEU ensures that the decision, which affects the person individually, is taken on a sufficiently solid factual basis. According to the Court, this entails verifying the factual allegations in the summary of reasons underpinning that decision. The Court further held that it is for the Court to request the competent EU authority to produce information or evidence – confidential or otherwise – relevant to such an examination. This requirement does not oblige the UN authority

<sup>22</sup> C. ECKES, *Decision-making in the Dark? Autonomous EU Sanctions and National Classification*, in *Amsterdam Centre for European Law and Governance Working Paper Series*, no. 2, 2012; C. ECKES, *EU Restrictive Measures*, cit., p. 894.

<sup>23</sup> C. ECKES, *EU Restrictive Measures*, cit., p. 871.

<sup>24</sup> See the webpage ‘Procedures for Listing’ at [www.un.org](http://www.un.org).

<sup>25</sup> *Ibid.*

<sup>26</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 107.



to produce all the information and evidence underlying the reasons alleged in the summary of reasons by the Sanctions Committee. The Court's review of the decision will be necessarily affected by the competent EU authority's inability to produce the relevant information or evidence.<sup>27</sup> These repercussions will be discussed in more detail in the following section.

In the case of EU sanctions implementing UN sanctions, at least part of the information and evidence provided by the UN member may never be communicated to the EU authority or the person concerned. The nature of the information provided by Member States is likely to be classified or at least confidential, as it necessarily relates to security and is likely to contain, for example, intelligence information. In the context of EU autonomous sanctions, the possession of information is not as problematic. The information and evidence is held either by the EU authorities or Member State authorities. Proposals for restrictive measures should be submitted by the EEAS or by the Member States.<sup>28</sup> According to the EU Council Guidelines, the proposals should include identifiers and reasons for listing. The reasons should be as specific and concrete as possible for each listing.<sup>29</sup> However, regardless of the possession of the information, the scope of access to one's file and the procedure for the concerned party's access in the EU does not seem to be as clear cut as one would expect given the CJEU's emphasis upon the right to effective judicial review and rights of defence.

### III. THE DEVELOPMENT OF THE RIGHT OF ACCESS TO THE FILE

The right of access to information is two-fold. First, it can have a privileged character, where the right of access is limited to those who have a special interest in the information or the proceedings to which the information relates. In these cases, the right of access to the file is an essential procedural safeguard. Secondly, the right of access can have a public character, when it serves the public at large. The core legal instrument regulating public access to documents in the EU is Regulation 1049/2001.<sup>30</sup> It is available to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State. In practice, the scope has been broadened in accordance with Art. 2, para. 2, of the Regulation to also cover non-EU natural and legal persons.<sup>31</sup> Access granted on the basis of Regulation 1049/2001 is *erga omnes* by nature, so a document made public by request on the basis of the Regulation is public for everyone, not just for the applicant.

<sup>27</sup> *Ibid.*, paras 119-123.

<sup>28</sup> Guidelines 11205/12, cit., Annex I.

<sup>29</sup> *Ibid.*

<sup>30</sup> Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>31</sup> See Council, *Comments on the Council's Rules of Procedure – European Council's and Council's Rules of Procedure*, 2016, Annex II, Art. 1; Art. 1 of Commission Decision (EC, ECSC, Euratom) 2001/937 of 5 December 2001 amending its rules of procedure.

According to Art. 6, para. 1, of Regulation 1049/2001 the applicant is not obliged to state reasons for the request.<sup>32</sup> The Regulation does not explicitly provide for file access or address the relationship between public and privileged access.<sup>33</sup>

Access to one's file has a solid legal backbone in the CFR, which establishes in Art. 41 the basic principle of access to file as part of the right to good administration. According to the Article, "[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union". The second paragraph specifies that the Article includes "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". Even though Regulation 1049/2001 does not contain rules on file access, there are various individual provisions on party or privileged access to documents in sectorial secondary law, which provide for privileged access to documents intended to enable parties to administrative proceedings to exercise their rights of defence.<sup>34</sup>

The lack of clear horizontally applicable procedural rules concerning file access seems to have had a trickle-down effect on public access to documents. Some of the individuals listed in decisions freezing funds have resorted to Regulation 1049/2001 in attempting to access information regarding the grounds of their listing. Already in 2007, the Court of Justice clarified in *Sison* the functioning of Regulation 1049/2001 in the context of sanctions and in situations where the applicant is mostly seeking privileged access to documents, but makes the request under the rules of Regulation 1049/2001. The Court ruled that, in the context of Regulation 1049/2001, the particular interest of the applicant in obtaining a document cannot be taken into account by the institution. The Court also pointed out that, should the applicant have a right to be informed in detail of the nature and cause of the accusation made against him, and that that right entails access to documents, the right could not be exercised through Regulation 1049/2001.<sup>35</sup>

Despite this fairly clear and early instruction given by the CJEU, individuals targeted by sanctions still appear to occasionally resort to Regulation 1049/2001 in their requests for access to documents concerning their listing.<sup>36</sup> One can only speculate as to the reasons

<sup>32</sup> See also Court of Justice, judgment of 23 November 2011, case C-266/05 P, *Sison v. Council of the European Union*, para. 44.

<sup>33</sup> Technically different arrangements have been adopted in the Member States. For example, in Finland, the Act on Openness contains the rules on public access to documents but also a general provision on party access is included in the Act. In addition to the general provision providing for party access, some sectorial rules contain specific provision on party access.

<sup>34</sup> B. DRIESSEN, *Transparency in EU Institutional Law: A Practitioner's Handbook*, Alphen aan den Rijn: Wolters Kluwer Law and Business, 2012, p. 186.

<sup>35</sup> *Sison v. Council of the European Union*, cit., paras 47-48. See also General Court, judgment of 26 May 2016, case T-110/15, *International Management Group v. European Commission*, para. 56.

<sup>36</sup> The most recent example being several requests made by individuals targeted by the Ukraine sanctions. See Council decisions in documents: 11385/14; 11409/14; 11543/14; 11548/14; 11562/14;

why some applicants resort to the public access regime. One possible reason is that it entails a clearly stipulated administrative procedure with deadlines and the right of appeal: something missing in the context of privileged access to information in the sanctions procedures. This is regardless of the fact that the chances of obtaining access to information through the public access regime should surely be more limited than privileged access, taking into consideration the nature of the information, which relates to international relations or security: interests strongly protected by Regulation 1049/2001.

The function of privileged access has been summarised by the General Court in a case concerning competition law, where the Court emphasised that:

“Access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections. [...] Access to the file is thus one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, that the right to be heard [...] can be exercised effectively. Observance of those rights in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings”.<sup>37</sup>

In fact, in the context of competition procedures, the rights of the targeted undertaking have been interpreted broadly so that it has been deemed inappropriate for the Commission alone to decide which documents are of use for the defence.<sup>38</sup> This assessment should be left to the targeted undertaking. However, the right of access to the file in this context is naturally balanced against the legitimate interest of protection of

11628/14; 11656/14; 13896/14; 15036/14; 15356/14; 15359/14; 15363/14; 15620/14; 15652/14; 15662/14; 15667/14 available at [www.consilium.europa.eu](http://www.consilium.europa.eu). In 2014 these requests amounted to a quarter of all confirmatory requests of the Council. See Council, *Council Annual Report on access to documents – 2014*, 2015, p. 20.

<sup>37</sup> General Court, order of 5 December 2001, case T-216/01 R, *Reisebank v. Commission of the European Communities*, para. 44.

<sup>38</sup> General Court, judgment of 29 June 1995, case T-30/91, *Solvay v. Commission of the European Communities*, para. 81. See also J. FLAHERTY, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to a Fair Hearing*, in *The Competition Law Review*, 2010, p. 63. Competition enforcement procedures also make use of a hearing officer working as a mediator e.g. in questions of access to documents of interested parties other than the targeted entity. The hearing officer seems to bear some resemblance to the special advocate procedure used by the common law countries in the case of sanctions, which will be discussed in *infra*, section IV. See K.J. CSERES, J. MENDES, *Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits*, in *Common Market Law Review*, 2014, pp. 510-514.

business secrets, as provided by Art. 41, para. 2, let. b), of the CFR. These considerations are specifically pertinent in multi-party proceedings.<sup>39</sup>

A similar broad approach to privileged access has not been deemed appropriate in the context of national security. In its analysis of the extent of judicial review of restrictive measures, the Court of Justice clarified that the rights of defence include the right to be heard and the right to have access to the file, which are, however, subject to legitimate interests in maintaining confidentiality.<sup>40</sup> The legitimate interests of confidentiality is a broader category than the more specific business secrets relevant in the context of competition procedures. According to the Court, the right to effective judicial protection – affirmed by Art. 47 of the CFR – requires that:

“the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons [...], so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question”.<sup>41</sup>

In the context of restrictive measures, the essential information relates specifically to the listing criteria and the evidence against the individual listed. This is the particular question that will be explored next, based on an examination of the CJEU’s case law in this specific area.

With regards to the right of access to the file of the individual targeted by the sanctions, the Court of Justice has found that overriding considerations concerning the security of the EU or of its Member States or the conduct of their international relations may preclude the disclosure of some evidence to the person concerned. In this context, the General Court and the Court of Justice have made specific reference to the case law of the European Court of Human Rights, which has held that, under Art. 6 of the European Convention of Human Rights, there may be restrictions on the right to a fully adversarial procedure. Restriction may be possible where it is strictly necessary in light of a strong countervailing public interest, such as national security, the need to keep secret certain police

<sup>39</sup> J. FLAHERTY, *Balancing Efficiency and Justice*, cit., p. 63. See also K. HAVU, X. TAN, *Procedure, Duration, Reasoning and Fines: Notes on the Basis of Case C-519/15 P Trafilerie*, in *European Competition Law Review*, 2017, p. 319.

<sup>40</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 99; Court of Justice, judgment of 21 December 2011, case C-27/09 P, *France v. People’s Mojahedin Organization of Iran* [GC], para. 66.

<sup>41</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 100; Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ* [GC], para. 53. However, in *Kadi II* the Court’s reading of the CFR seems to mix these two elements, which can be taken as a token of the intertwined nature of these rights, see in particular paras 99-100 of the judgment.

methods of investigation or the protection of the fundamental rights of another person.<sup>42</sup> It is noteworthy that the Court of Justice makes a distinction between its own right of access and the right of the individual concerned by stating that national security concerns are not a valid objection to withhold the information from the Court.<sup>43</sup> Thus the Court, with reference to the previous case law of *Kadi* and the case *ZZ*, reserves the right to obtain the information and the documents. Moreover, the Court assigns itself the task of applying techniques, which accommodate the legitimate security considerations about the nature and sources of information being taken into account in the adoption of the act concerned and the need to sufficiently guarantee the individual's procedural rights, such as the right to be heard and the requirement for an adversarial process.<sup>44</sup>

In doing this, the Court places itself in a position where it determines whether the reasons provided for non-disclosure are well-founded. Should that not be the case, the Court will give the competent authority the opportunity to reconsider disclosure. Should the authority disagree with the Court on disclosure, the CJEU will then restrict itself in its examination of the lawfulness of the contested measure to only the material, which has been disclosed. In the opposite situation, where the Court agrees with the non-disclosure of the evidence or information to the individual concerned, it is for the Court to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular the adversarial process, and the security or international relations concerns of the EU or its Member States. In this balancing, the Court could resort to disclosing a summary outlining the content of the information or the evidence.<sup>45</sup> Due to the security framework, the Court is actually placing itself in the position of the targeted individual or entity and examines the evidence on its behalf. It is for the Court to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned, and the inability of the individual to submit their observations, are such as to affect the probative value of the confidential evidence.<sup>46</sup>

This is the balance between, on the one hand, maintaining international security and, on the other, the protection of fundamental rights struck by the Court of Justice with regard to UN based sanctions. Contrary to the finding of the General Court, the Court of Justice has confirmed that the mere fact that the individual targeted by the sanctions does not have access to all of the information or evidence forming the basis

<sup>42</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 125. For references to cases of the European Court of Human Rights, see General Court, judgment of 30 September 2010, case T-85/09, *Yassin Abdullah Kadi v. European Commission*, paras 146 and 176; and *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)* [GC], cit., para. 344. The case law of the European Court of Human Rights will be further discussed below.

<sup>43</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., para. 125.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, paras 126-128.

<sup>46</sup> *Ibid.*, para. 129.

of the listing decision is not as such an infringement of their relevant procedural rights.<sup>47</sup> However, these circumstances might be relevant with respect to the Court's examination of the lawfulness of the decision. From the perspective of the individual, the fact that access to all evidence is not granted, and that the Court assesses and uses such evidence in the way it deems appropriate in the procedure, leaves a fairly wide margin of discretion to the Court in its assessment of the legality of the decision.

Subsequent case law is helpful in clarifying some of the procedural aspects of how access is to be gained (following a specific request) and when it is to be gained (within a reasonable period) in the context of sanctions. The General Court has consistently held that the EU institutions do not have a duty to spontaneously give access to file.<sup>48</sup> Gaining access to your own file thus requires activity by the targeted person who needs to apply for access to receive the information forming the basis of the listing.<sup>49</sup> Another aspect that the General Court has emphasised in its scrutiny of the right of access is the timeliness of disclosure: access is to be granted in a timely manner so that the targeted person has the possibility to examine the evidence and prepare a defence. In the absence of clear procedural rules on the exact time limits for providing the information, the standard set by the General Court is that the information should be disclosed "within a reasonable period", which is in accordance with the general obligation flowing from Art. 41, para. 1, of the CFR.<sup>50</sup> However, what is a reasonable period remains vague. For example, in the context of third country sanctions, the General Court has found that 19 months of administrative silence on the part of the Council in responding to a request for file access constituted a breach of the "reasonable period" and thus also an infringement of the rights of defence.<sup>51</sup> Flexibility of time limits, however, is a broader administrative law problem not specific to the context of sanctions.<sup>52</sup>

A third procedural point clarified by the case law specifically with regard to restrictive measures is that, contrary to the general principle relating to the right to be heard

<sup>47</sup> *Ibid.*, paras 137-138.

<sup>48</sup> General Court: judgment of 14 October 2009, case T-390/08, *Bank Melli Iran v. Council of the European Union*, para. 97; judgment of 5 February 2013, case T-494/10, *Bank Saderat Iran v. Council of the European Union*, para. 53.

<sup>49</sup> After a listing decision is made and the relevant EU legal instruments have been published in the Official Journal, a notice is published in the Official Journal for the attention of the targeted individuals with information about the possibilities of review of the decision. The notice does not contain specific guidance about access to information. See e.g. Notice for the attention of the persons subject to the restrictive measures provided for in Council Decision 2014/119/CFSP and in Regulation (EU) 208/2014 of the Council concerning restrictive measures in view of the situation in Ukraine of 8 March 2016.

<sup>50</sup> General Court, judgment of 16 September 2013, case T-8/11, *Bank Kargoshaei et al. v. Council of the European Union*, para. 93.

<sup>51</sup> See e.g. General Court, judgment of 22 September 2015, case T-161/13, *First Islamic Investment Bank v. Council of the European Union*, para. 83.

<sup>52</sup> More broadly on the difficulty of determining a "reasonable time", see P. LEINO, *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU*, in *European Public Law*, 2014, p. 695.

on matters that might affect your rights in an adverse manner, the specific nature of the restrictive measures and the importance of their element of surprise presupposes that the targeted person will not and does not have to be heard in advance.<sup>53</sup> The case law of the CJEU, however, makes a distinction between initial listing decisions and decisions keeping an individual on the list. In the former case, the individual will not be given the opportunity to effectively make known their views on the grounds advanced against him before the adoption of the decision. In the latter case, the procedural obligation needs to be complied with before the decision is taken.

However, the fact that the Court finds an infringement of the rights of defence does not automatically lead to an annulment of the decision. On the contrary, the General Court has deemed it necessary to scrutinise, if the procedural infringement constitutes such a breach of the rights of the defence that would justify the actual annulment of the act concerned. According to the General Court, this is the case only in situations where it is established that the restrictive measures could not have been lawfully adopted or maintained if the undisclosed document had had to be excluded as inculpatory evidence.<sup>54</sup> This conditionality with regard to the consequence of the infringement seems to be consistent with the case law of the CJEU in relation to other breaches of procedural rights in different substantive contexts. For example, in a preliminary reference concerning the extension of detention of a third-country national with a view to his removal from the country, the Court of Justice held that an infringement of the right to be heard will result in an annulment only if the outcome of the procedure might have been different in the absence of the irregularity.<sup>55</sup> The Court of Justice has emphasised the interest of effectiveness of EU law in that only irregularities that could have made a difference in the outcome are sufficient to amount to an annulment of the decision.<sup>56</sup>

#### IV. ACCESS TO “SECRET EVIDENCE” BY THE CJEU

The *Kadi* case law clearly sets out that the right of access to the file is subject to limitations, which have been further defined by the General Court. Nevertheless, the CJEU

<sup>53</sup> *European Commission et al. v. Yassin Abdullah Kadi (Kadi II)* [GC], cit., paras 112-113; and *France v. People's Mojahedin Organization of Iran*, cit., paras 61-67.

<sup>54</sup> See e.g. General Court, judgment of 6 September 2013, joined cases T-35/10 and T-7/11, *Bank Melli Iran v. Council of the European Union*, para. 100; and *First Islamic Investment Bank v. Council of the European Union*, cit., para. 84.

<sup>55</sup> Court of Justice: judgment of 10 September 2013, case C-383/13 PPU, *G. and R.*, para. 38; judgment of 14 February 1990, case C-301/87, *France v. Commission of the European Communities*, para. 31; judgment of 5 October 2000, case C-288/96, *Germany v. Commission of the European Communities*, para. 101; judgment of 1 October 2009, case C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v. Council of the European Union*, para. 94; judgment of 6 September 2012, case C-96/11 P, *August Storck v. OHIM*, para. 80.

<sup>56</sup> *G. and R.*, cit., para. 41. See also General Court, judgment of 2 February 2017, case T-29/15, *International Management Group v. European Commission*, para. 139.

can be considered a proponent for procedural rights in the context of restrictive measures, particularly in comparison to the UN.<sup>57</sup> Moreover, it is remarkable that the CJEU opted for at least some protection of procedural rights even though the difficulties of realising these rights were obvious already when the *Kadi* cases were decided, since some of the procedural aspects, such as access to information, were questions that the EU had limited means of influencing.<sup>58</sup>

In the case law of the CJEU, the principal interest has been in securing the Courts' right to all information forming the basis of a listing decision. The CJEU have emphasised the need for all possible information, confidential or not, relevant to the examination by the Court. The General Court has specifically noted that the Council is not entitled to base a restrictive measure on information or evidence in the file communicated by a Member State, if the Member State is not willing to authorise its communication to the Courts.<sup>59</sup> The lack of disclosure of the information to the CJEU has been the primary reason for repeated annulments of EU measures imposing sanctions on individuals.<sup>60</sup> However, with the recent introduction of the possibility of closed procedures in the Rules of Procedure of the General Court, the CJEU is now put in a position where it in principle has wider access to information than the targeted persons.

Departing from the adversarial principle and the equality of arms in the context of criminal procedures – and other procedures related to national security such as the issue of terrorist listings – has been a common concern of various jurisdictions. The European Court of Human Rights addressed this issue in the context of a case concerning the interpretation of Art. 6 of the European Convention of Human Rights on the right to a fair trial. The European Court held that the use of confidential material may be unavoidable where national security is at stake.<sup>61</sup> However, the European Court emphasised in this context that it does not mean that the national authorities are free from effective control by the domestic courts whenever they choose to assert that national

<sup>57</sup> However, the review procedure of the Security Council has also been developed and can at least improve the handling of these cases by the CJEU. On this point see J. KOKOTT, C. SOBOTTA, *The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law*, Oxford: Hart Publishing, 2014, p. 221.

<sup>58</sup> On the interaction between the EU and the UN regimes as regards protection of individual rights, see C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylant-Larcier, 2013. On judicial dialogue between the Strasbourg and Luxembourg courts, see J. LARIK, F. FABBRI, *Dialoguing for Due Process: Kadi, Nada and the Accession of the EU to the ECHR*, in *Leuven Centre for Global Governance Studies Working Paper*, no. 125, 2013.

<sup>59</sup> General Court, judgment of 21 March 2012, joined cases T-439/10 and T-440/10, *Fulmen and Fereydoun Mahmoudian v. Council of the European Union*, para. 100. See also C. ECKES, *EU Restrictive Measures*, cit., p. 894.

<sup>60</sup> E. NANOPOULOS, *European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?*, in *Modern Law Review*, 2015, p. 930.

<sup>61</sup> European Court of Human Rights, judgment of 15 November 1996, no. 22414/93, *Chahal v. The United Kingdom*, para. 131.



security and terrorism are involved.<sup>62</sup> According to the European Court, there are techniques, which can be employed that accommodate both legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.<sup>63</sup>

One of these techniques that the European Court of Human Rights is referring to is the use of a special advocate in closed material procedures, which is used in the common law countries, and has been justified on a due process basis. This is because they offer at least some elements of procedural fairness to the party excluded from the closed hearing of the Court.<sup>64</sup> A consensus appears to be emerging between common law countries that special advocates can be justified as a legitimate human rights safeguard.<sup>65</sup> Particularly in the UK, the scope of closed material procedures and special advocates has expanded into covering various types of cases and courts, even though the total number of these cases is relatively low: in total 22 cases in 2014.<sup>66</sup> While the closed material procedures may vary depending on the type of case or the handling court, the common feature of the procedure is that it allows material to be withheld from the non-governmental party on public interest grounds, such as national security, and excludes the party from the procedure by replacing the party with a special advocate.<sup>67</sup> The role of the special advocate is two-fold: the advocate tests the executive's case for non-disclosure and represents the interests of the targeted person in the proceedings. The advocate is not formally responsible to the party and can only have limited contact with the party after disclosure of the information to the special advocate.<sup>68</sup>

The use of the special advocates has been criticised in the UK by various actors as jeopardising the fairness of the procedure.<sup>69</sup> However, the European Court of Human Rights has at least been interpreted as encouraging the use of the special advocate procedure. Eva Nanopoulos has argued that the case law of the European Court of Human Rights has not only validated but in fact normalised the use of closed material procedures and special advocates.<sup>70</sup> Indeed, the European Court has often referred to the

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> J. JACKSON, *The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition*, in *The International Journal of Evidence & Proof*, 2016, p. 345.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, p. 344.

<sup>67</sup> E. NANOPOULOS, *European Human Rights Law*, cit., p. 916.

<sup>68</sup> *Ibid.*; and A. KAVANAGH, *Cases: Special Advocates, Control Orders and the Right to a Fair Trial*, in *Modern Law Review*, 2010, p. 838.

<sup>69</sup> E. NANOPOULOS, *European Human Rights Law*, cit., p. 917.

<sup>70</sup> *Ibid.*, p. 924 *et seq.*

use of a special advocate as a means by which to counterbalance the procedural unfairness caused by the lack of full disclosure in national security cases.<sup>71</sup>

The use of special advocates in the context of restrictive measures in the CJEU has been discussed and proposed in the academic literature.<sup>72</sup> However, the new Rules of Procedure of the General Court opted for a different solution, which has been criticised, from the perspective of fair trial rights, to be much worse than the use of a special advocate.<sup>73</sup> Art. 105 of the Rules of Procedure essentially consolidates the procedure and repercussions of the use of confidential security-related information not disclosed to the targeted person as established in *Kadi* and *ZZ*.<sup>74</sup> However, the Rules of Procedure go further than the case law in *Kadi* and *ZZ* and do not line-up with the principles set out in those cases.<sup>75</sup> The Article is not limited to cases of restrictive measures. It refers more broadly to information or material pertaining to the security of the Union or that of one or more of its Member States or to the conduct of their international relations. However, considering the limited jurisdiction of the Court of Justice in CFSP matters, it is likely that the Article finds its main relevance in the context of restrictive measures.

The EU closed procedure can be initiated if a main party intends to base its claims on information or material the communication of which would harm the security of the

<sup>71</sup> See in particular European Court of Human Rights, judgment of 19 February 2009, no. 3455/05, *A. et al. v. The United Kingdom*, paras 209-211 and 220; and *Chahal v. The United Kingdom*, cit., para. 131.

<sup>72</sup> See C. ECKES, *Decision-making in the Dark?*, cit., pp. 20-23; and C.C. MURPHY, *Secret Evidence in EU Security Law: Special Advocates Before the Court of Justice?*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham: Edward Elgar, 2013.

<sup>73</sup> E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

<sup>74</sup> A parallel provision has been inserted in Art. 190a of the Rules of Procedure of the Court of Justice to provide equal protection of information in situations, where an appeal is brought against the judgment of General Court in a case where the procedure in Art. 105 of the Rules of Procedure of the General Court has been used. See Amendment of the Rules of Procedure of the Court of Justice of 12 August 2016. Moreover, security rules have been adopted by the CJEU to facilitate the application of the new provisions in the Rules of Procedure. See Decision (EU) 2016/2386 of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Art. 105 of its Rules of Procedure; and Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Art. 105, paras 1 or 2, of the Rules of Procedure. These security rules entered into force in December 2016, so the practical use of these rules remains to be seen. On the EU classification system, see D. CURTIN, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, in *Common Market Law Review*, 2013, pp. 425-443.

<sup>75</sup> D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges*, Study for the LIBE Committee, 2014, [www.europarl.europa.eu](http://www.europarl.europa.eu), p. 8. See also the Draft Rules of Procedure of the General Court submitted to the approval of the Council, where the General Court justifies the introduction of the new Art. 105 with reference to compliance with the case law of the European Court of Human Rights. This justification is made without further elaboration on the use of special advocates, which, more accurately, can be argued to be the technique endorsed by the European Court. See Council, Draft Rules of Procedure of the General Court 7795/14 of 17 March 2014, pp. 101-105.

Union or a Member State(s) or the conduct of their international relations. According to para. 1 of Art. 105 of the Rules of Procedure of the General Court the closed procedure starts with the production of a separate document and an application for confidentiality “setting out the overriding reasons which, to the extent strictly required by the exigencies of the situation, justify the confidentiality of that information or material being preserved and which militate against its communication to the other main party”. The General Court then examines the material with reference to its confidential nature. Should the General Court find the information or material relevant in order for it to rule on the case, but not confidential according to its estimation, it shall ask the party concerned to authorise the communication of that information or material to the other main party. According to para. 4 of Art. 105, if the main party objects to such communication within a period prescribed by the President, or fails to reply by the end of that period, that information or material shall not be taken into account in the determination of the case. In the opposite situation, where the General Court finds the information to be confidential, it will not communicate that information or material to the other main party. Rather, it will then weigh the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle, against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations.<sup>76</sup>

After weighing up these matters, the General Court makes a reasoned order specifying the procedures to be adopted to accommodate the requirements of the right to effective judicial protection. As an example of such a procedure, Art. 105, para. 6, of the Rules of Procedure mentions the communication of a non-confidential version or a non-confidential summary of the information or material containing the essential content and enabling the other main party, to the greatest extent possible, to make its views known.<sup>77</sup> The Court is entitled to base its decision on such information despite the exception to the adversarial principle, if the information or material is essential in order for it to rule in the case. This particular provision has been criticised as going further than the principles set out in the case law of *Kadi* and *ZZ*.<sup>78</sup> One of the limitations set by

<sup>76</sup> In the UK context this is called the “Wiley balance”. Eva Nanopoulos points out that this balancing is “the only positive aspect of the new rules compared to the UK version”, which only provides for the Wiley balance in specific types of claims. E. NANOPOULOS, *European Human Rights Law*, cit., pp. 917 and 930.

<sup>77</sup> It can be argued that the wording of this paragraph does not exclude the possibility of using a special advocate when “adopting procedures accommodating the requirements of the right to an effective judicial protection”. However, literature seems settled with the fact that this possibility is excluded, when it is not specifically provided for in the Rules of Procedure. See E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

<sup>78</sup> D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., p. 58. However, the use of such information is not foreign to the legal systems of the Member States such as Finland, where the Supreme Administrative Court has held that national security is a legitimate ground to limit privileged access, and it is for the court to assess the bearing of such undisclosed evidence on the

the European Court of Human Rights on the use of undisclosed evidence in the context of detention is that fair trial rights prevent basing a decision maintaining detention solely, or to a decisive degree, on closed material.<sup>79</sup> A similar clear limitation is not explicitly provided for in the Rules of Procedure, with its Art. 105, para. 8, stipulating that the Court is to be confined to what is strictly necessary. Moreover, when assessing that information or material, the General Court shall take account of the fact that a main party has not been able to make its views on the information or material known.

Art. 105 of the Rules of Procedure cements the Court's right of access in the context of restrictive measures. The wording of the Article also gives a fairly wide margin of discretion to the Court as to its use of the material or information not to be disclosed to the party, but which is still essential for the Court to rule on the case. The fact that the Court considers the information essential but the parties' access rights to such information are limited raises some concern from the perspective of accountability, even though the Court is to be confined to what is strictly necessary. The use of the term "necessary", again, leaves a fairly wide margin of discretion. Moreover, the Court has discretion with regard to, for example, requesting the other party to produce a summary of the non-confidential content of the information or material and how the other party then can make his views known. The Court also has discretion as to how it takes into account the fact that the main party has not been able to make its views on the information or material known.<sup>80</sup>

It can be argued that, regardless of the lack of full access to the documents by the main party, the fact that the Court has wider access to these documents is an improvement from the perspective of effective judicial review. At least the Court is now in a better position to make informed judgments based on the widest possible material and evidence. However, from the perspective of the targeted individual, the undermining of the right of access to the file has immediate repercussions with respect to the strength of judicial review as an accountability measure and also from the perspective of "seeing justice to be done" in these cases. Eva Nanopoulos argues that the acceptance of the European Court of Human Rights and the CJEU of these limitations to fair trial rights of individuals has also contributed to the social acceptance of these limitations, which otherwise would not have been accepted.<sup>81</sup>

case and conduct a balancing between the conflicting interests. See the series of judgments of the Supreme Administrative Court of Finland of 12.7.2007 in KHO 2007:47, 2007:48 and 2007:49 concerning the right to reside (2007:47 and 2007:48) and citizenship (2007:49). I would like to thank Professor Ida Koivisto for highlighting these cases in our second workshop. On the ways different Member States tackle the issue of using intelligence information in the courts see D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., pp. 20-35.

<sup>79</sup> *A. et al. v. The United Kingdom*, cit., para. 220.

<sup>80</sup> Eva Nanopoulos has also criticised the lack of definition of crucial terms in the Article. E. NANOPOULOS, *European Human Rights Law*, cit., p. 930.

<sup>81</sup> *Ibid.*, p. 932.

## V. CONCLUSIONS

A focus on access to documents reveals three layers of transparency in the context of sanctions. Privileged access rights are codified in the CFR and have been specifically established to be relevant in the context of review of restrictive measures. However, the case law and the Rules of Procedure of the General Court make it clear that these rights can be limited specifically in the interest of public security. With regard to public access to documents, it is fairly clear that this is the most limited sphere of access, even though in practice it still seems to be utilised for privileged access purposes. Of these three, the widest access is granted to the General Court, whose access rights seem to be fairly unlimited after the recent amendments to the Rules of Procedure. Moreover, it is not only the access rights of the Court that are unlimited. The Court is also given a fairly wide margin of discretion as to its use of the material it receives based on the wide access rights. However, there is still little experience on the use of this right. Essentially, it does not change the situation that the originators of the information still have the ultimate power to decide whether to disclose all the evidence to the EU institutions.

The question of access to information in this context raises some interesting shifts in the traditional administrative law paradigms. The introduction of the EU closed procedure significantly changes the role of the Court from a review institution to an institution that uses a fairly wide margin of discretion with regard to the assessment of information. This use of discretion is not controlled by another institution and not even mediated by a special advocate procedure. In a way, the EU Court partly absorbs the role of the executive, whose actions and use of discretion courts traditionally review. In the context of restrictive measures, the price to pay for making the executive – rightly so – accountable for its decisions concerning restrictive measures is that the Courts become less accountable, or at least can be seen to provide less efficient accountability from the perspective of the individual concerned.<sup>82</sup>

The fact that the General Court is partly conducting its review in secret, and is given a fairly broad margin of discretion in its assessment of the secret evidence, is bound to undermine the legitimacy of the CJEU and requires a great amount of trust in the integrity of the Court. A general premise that has recently been challenged is that the CJEU enjoys a high level of normative and sociological legitimacy.<sup>83</sup> It remains to be seen if the introduction of the new closed procedure has had, or will have, some impact on the

<sup>82</sup> For this formulation of the shift of the role of the Court, the author owes thanks to Professor Olli Mäenpää, who commented on a draft paper in the second workshop held in Helsinki in June.

<sup>83</sup> M.A. POLLACK, *The Legitimacy of the Court of Justice of the European Union*, in H. COHEN, N. GROSSMAN (eds), *Legitimacy and International Courts*, Cambridge: Cambridge University Press, Forthcoming, p. 56, available at [www.papers.ssrn.com](http://www.papers.ssrn.com). See also J.H.H. Weiler's critique on simplifying the question of legitimacy, which mostly focuses on the crossing of the line between the judicature and legislature by the Court of Justice. J.H.H. WEILER, *Epilogue: Judging the Judges – Apology and Critique*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe's Judges*, Oxford: Hart Publishing, 2013.

sociological legitimacy of the Court. Any effect is likely to be softened by the fact that many Member States have had to deal with a similar balancing act when it comes to the handling of secret evidence.<sup>84</sup>

From a comparative perspective, the balancing adopted in the Rules of Procedure of the General Court can be regarded to be one of the strictest approaches, since it does not contain an explicit reference to the use of a special advocate to mediate the limitations placed upon the adversarial principle. Moreover, there are also Member States that do not allow for the use of secret evidence in courts.<sup>85</sup> However, as Mark Pollack notes, “the public legitimacy of the Court rests on a very thin base of public knowledge about the Court, which appears to borrow much of its legitimacy from more general attitudes towards Europe and the rule of law”.<sup>86</sup> This implies that a technical change of rules, such as that in question, will not have much of an effect on the public legitimacy of the Court.

<sup>84</sup> D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence*, cit., pp. 20-35.

<sup>85</sup> *Ibid.*, pp. 28-29.

<sup>86</sup> M.A. POLLACK, *The Legitimacy of the Court of Justice*, cit., p. 56.

